



No. 295

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FILED

OCT 1 1945

CHARLES ELMORE CRO
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1945

CLOVERLEAF BUTTER COMPANY, a Corporation,
Petitioner (Claimant-Appellee Below),

vs.

UNITED STATES OF AMERICA,
Respondent (Appellant Below).

PETITION FOR CERTIORARI TO UNITED
STATES CIRCUIT COURT OF APPEALS,
FOR THE FIFTH CIRCUIT

REPLY BRIEF OF

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The brief in opposition filed in this cause by the acting Solicitor General for the United States serves to emphasize the importance of this case, the conflict, the differences of opinion, and the varied actual and possible constructions of the two statutes, the Renovated Butter Act and the Federal Food, Drug & Cosmetics Act in such manner as to show the vital necessity of having the matters at issue resolved by the final arbiter—The Supreme Court of the United States.

In *Cloverleaf Butter Company versus Patterson*, (315 U.S. 148), this Court recognized the fact that the renovated butter business is a substantial industry; and this is corroborated by statistics as to production very much increased during recent years.

The renovated butter industry, which has been operated for so many years under special Federal Statute, and under strict control of the Bureau of Dairying of the United States, is entitled to know whether or not it shall be permitted to continue to operate; or whether the business is

to be outlawed by construction placed upon the Federal Food, Drug & Cosmetics Act by the court below.

Realities must be faced by every business; and none can be operated successfully on pure theory. The practical operation of this business requires that the industry secure its raw material by purchase of sub-standard country butter wheresoever the same may be found within the range of its plant. During all the years of its operation, this business has relied upon the authority of the United States Secretary of Agriculture, his supervision, tests, regulations and inspection to finally determine whether or not the finished product when manufactured is suitable for shipment and sale in interstate commerce.

This Court in the Patterson case supra declared:

"By the statutes and regulations the Department of Agriculture has authority to watch the consumer's interest throughout the process of manufacture and distribution." (315 U. S. p. 168 of opinion.)

This Court said further in the same opinion:

"Whether the sanction used to enforce the regulation is condemnation of the material or the product is not significant." (Page 169 of opinion, 315 U. S. 169.)

As previously contended, the Congress has by the Renovated Butter Act made the final test as to suitability the condition of the finished product. Construction of the Federal Food, Drug & Cosmetics Act, as contended for by the Government, would absolutely prohibit the introduction into interstate commerce of any packing stock butter, or raw material, affected by the slightest contamination, and not fit for human food in its then condition; and able to pass every test of the Federal Food, Drug & Cosmetics Act. If all packing stock were in such condition there would be no occasion for renovation.

The Federal Food, Drug & Cosmetics Act not only prohibits the introduction into interstate commerce of raw material or packing stock not then fit for human food, and in such shape as to pass the test and standard of Federal Food, Drug & Cosmetics Act, but provides for such seizures as here attempted to be enforced; and prohibits the use of such material unless and until it has been passed upon by a court; bond given; and provision made for its processing under the eye of the administrator by order of the Court, and at the expense of the owner.

The processor is not only subjected to such impossible limitations and restrictions, but he would also be liable to criminal prosecution. Thus not only would the processor be subjected to such criminal prosecution, but every small farmer who attempted to ship his country or packing stock butter or raw material for renovation in interstate commerce, or introduce it into interstate commerce, would be liable to criminal prosecution as noted in our petition, page 12 in the following language:

"The introduction or delivery for introduction into interstate commerce of any food, that is adulterated or misbranded is prohibited. (U.S.C.A. Title 21, Sec. 331). Any person violating any of the provisions of Section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000 or both such imprisonment and fine; and for conviction of subsequent violation may be imprisoned for not more than three years. (U.S.C.A. Title 21, Sec. 333 — U.S.v. Dotterweich, 230 U.S. 277; 64 S. Ct. 134.)"

Title 21, Section 331 U.S.C.A., among other things defines Prohibited Acts under the Federal Food, Drug & Cosmetics Act as follows:

"331 Prohibited Acts.

"(c) The receipt in interstate commerce of any

food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

“(d) The introduction or delivery for introduction into interstate commerce of any article in violation of section 344 or 355.”

The penalties for such violation are set out and defined in U.S.C.A. Title 21, Sec. 333, as follows:

“333 Penalties.

“Violation of Section 331

“(a) Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine.”

The construction of the act by this Court is case of U. S. v. Dotterweich (320 U.S. 277, 64 S.C.P. 134), shows that such small farmer or other innocent party would be liable to the criminal penalties provided in the Act, notwithstanding there was no intent on his part to violate any Federal Law or regulation; and that the shipping of such material served a necessary purpose in the conduct of the renovated butter business.

Not only this, but under criminal code section 37, (U.S. C.A. Title 18, Sec. 88) if there were any agreement evidenced by any overt act on the part of the manufacturer or the truck driver or the small farmer who provided the country butter or packing stock, as raw material shipped in interstate commerce to a renovating plant, all of them would be subject to prosecution under the Conspiracy Stat-

ute, and would be subjected to the heavy penalties of that Statute, notwithstanding there was no intent on their part to violate any Federal Law.

The debates and reports in Congress at the time the Special Statute known as the Renovated Butter Act was adopted in 1902, both before the committee and on the floor, show the Congress was fully informed of the existing conditions; that the committee reported and Congress passed this Special Act in order to meet the situation, after having had continued hearings, lengthy debates, long reports and full deliberation on the subject under investigation. Not only that, but amendment after amendment was proposed and voted upon during the hearing. The condition to be remedied and the manner in which it was to be done were both known to Congress. At the time when the Act was re-adopted and re-enacted in 1939 (Internal Revenue Code, Sec. 2320 et seq) the Congress knew the history of the law and its long operation.

It is inconceivable that Congress, by general statute, intended to modify or destroy the Special Renovated Butter Statute or to repeal the same, or to destroy the Renovated Butter Industry, an established manufacturing business which had been operating successfully for nearly fifty years under the supervision of the Secretary of Agriculture.

The Federal Food, Drug & Cosmetics Act had another field of operation. Yet under the construction of the Federal Food, Drug & Cosmetics Act in the Court below; and as contended for by the Government here; and as declared in the Maple Syrup Case (110 Fed. (d) 914), and in the Dotterweich case, supra; if sustained by this Court; the Renovated Butter Industry would be outlawed and destroyed.

The Government contends that because the Meat Inspection Act was excepted from the operation of the Food, Drug & Cosmetics Act and the Renovated Butter Act was

not specifically excepted, the Congress intended for the Federal Food, Drug & Cosmetics Act to be applicable to the Renovated Butter Industry. It is our conviction that by reason of the fact that Congress had repeatedly sought to integrate the Renovated Butter Act with the Meat Inspection Act, Congress intended that exception in the Federal Food, Drug & Cosmetics Act to apply to the Renovated Butter Act.

However, passing that, Congress is presumed to have been fully informed of the existing special statute and never intended by a general law to nullify or repeal the special Renovated Butter Statute which had been successfully in operation for so many years.

This Court in the case of Securities and Exchange Commission v. C. M. Joiner Leasing Corporation et al (320 U. S. 344; 64 U. S. Sup. Ct. Rep. 320; 64 Sup Ct. Rep. 120) effectively disposes of the Government's contention in this respect.

THE NINE BARRELS OF BUTTER CASE

On page 6 of the Government's brief the statement is made:

"Even under the earlier statute, however, the Food and Drug Administration had seized packing stock butter consigned to process butter plants, and this had been upheld."

In support of this, the Government's brief cites United States v. Nine Barrels of Butter, 241 Fed. 499.

Again on page 8 the Government's brief says:

"The Food and Drug Administration had, under the predecessor Food and Drugs Act of 1906, repeatedly seized packing stock butter consigned to renovated butter plants." (Citing foot notes 4 and 5 of dissenting

opinion in the Patterson Case, supra, and *again citing* United States v. Nine Barrels of Butter, supra. Page 8 of Government's Brief.)

The Government's counsel is certainly in error in making the statement on both pages to the effect that the butter seized in the Nine Barrels Butter Case was *destined for renovation*.

This statement by the Government should be sufficiently refuted by the following quotation on the statement of facts written by Learned Hand, District Judge, set out in 241 Fed. Rep. on page 500:

"This treatment is known as 'ladling', and consists in dividing the butter into small portions, a pound or more in size, and in manually picking out with a trowel such parts as show dirty to the eye of the operator. The amount so removed varies generally from 2 to 5 per cent, but sometimes rises much higher. The butter thus cleansed is then put into a room at about 85° F., which makes it plastic and capable of being molded into pats of proper size and homogeneous quality. It is then colored evenly and sold only to bakers. In baking, the butter passes through a temperature of from 350° to 500° F., under which most of the rancid oils are volatilized and driven off. Under the evidence as given, it must be assumed that the butter so used by bakers is not deleterious to the public health."

It thus appears that the Government's brief is decidedly in error in saying the butter involved in the Nine Barrels of Butter Case was consigned to a renovating butter plant. The butter was shipped for ladling. The difference between ladling and renovating is vast; the former is merely the reworking, by manual process, the butter on a table and picking out visible foreign particles. In ladling nothing further is done and that term does not mean nor imply, melt, clarify, pasteurize and refine the butter or the re-

sulting butter oil as is done when the packing stock butter is renovated.

There should be no misunderstanding nor controversy about the decision of Judge Hand in this case. In the opinion he shows that he could not escape the conclusion that the butter there under examination was filthy and decomposed in part; and he held that he had the power to destroy, sell, or re-deliver the same to the owner under bond, acting under the Pure Food & Drug Act of 1906. The Court states that he might have delivered the goods to the owner upon the condition that they "ladle" the butter or that they otherwise treat it so as to secure the health of the community.

But the Court expressly held that *ladling* of the butter would not be permitted and then says as shown on page 501 of said opinion, *supra*:

"There is, however, another and much more radical method of cleansing such butter, known as 'renovating', which is as follows; The butter is melted to a fluid, so that all solid matters fall to the bottom. It is then strained and blown into a spray, in which condition hot water is allowed to percolate through the butter oil. The water is then drawn off, and an emulsion made with milk is then cooled into crystals, salted, and packed in containers. As such it is sold for table butter, and in many instances is unquestionably a useful article of food, and is permitted access to the markets, where it is not unlawful."

That opinion was rendered April 9, 1917. It is a matter of common knowledge and sustained by the opinion in the Patterson Case, *supra*, that great improvements have been made in the science of renovating butter since the Nine Barrels of Butter opinion was handed down. Under the authority of that decision after condemnation of the material, the trial court in its discretion could permit the

packing stock butter to be delivered to the owner under bond to be brought into compliance with the Federal Pure Food Law by a time-consuming, expensive, and tedious procedure set out in U.S.C.A. Title 21, Sec. 334, sub-section (d) of the Federal Food, Drug & Cosmetics Act.

If this tedious and expensive ritual were pursued under court order, where would the ultimate consumer gain any benefit whatsoever over the result now being obtained under the direct supervision and inspection of the renovated butter industry by the Secretary of Agriculture under the special statute known as the Renovated Butter Act of 1902?

The Government's brief on pages 9 and 10 refers to memorandum of the Chief of Bureau of Dairy Industry to the Solicitor of the Department of Agriculture, dated October 4, 1940; and to letter by the Assistant Chief of the Bureau of Dairy Industry to the Solicitor of the Department of Agriculture, written in July 1941, both of which are referred to and quoted in notes in dissenting opinion of the Chief Justice in the Patterson Case, *supra*.

The *renovated butter industry* might advisedly take issue with the statements quoted from the Chief of the Bureau of Dairy Industry referred to as set out in said foot notes.

However, it should be sufficient to say, that, as pointed out in the Patterson Case, 315 U. S. page 168 referring to the provisions of the Renovated Butter Act and regulations promulgated thereunder by the Secretary of Agriculture:

"Inspection of the factory and of the material was provided for explicitly. Confiscation of the finished product was authorized upon a finding of its unsuitability for food through the use of unhealthful or unwholesome materials, a finding that might be based upon visual or delicate laboratory tests, or upon observation of the use of such materials in the process of manufacture."

Thus, the Secretary of Agriculture may follow through any particular lot of packing butter about the use of which there could be any possible doubt or question from the delivery to the processing plant or even from the initial introduction of the raw material into interstate commerce through all the stages of manufacture to the completion of the finished product. If there is any question as to the finished product, or as to its wholesomeness and suitability for food, the Secretary has the absolute right and authority to seize and condemn the same.

Also whenever the finished product is introduced into interstate commerce the same becomes immediately subject to all the provisions of the Federal Food, Drug & Cosmetics Act.

The Government's brief on pages 11 and 12 referring to the dissenting opinion in the Patterson Case by the Chief Justice comments on foot note 5, 315 U.S. at page 179 of said opinion to the effect that between July 1, 1933, and January 1, 1942, 36 seizures were made of lots of butter which had been consigned to renovated butter plants.

We do not have access to records and reports of the 36 seizures referred to, but we call attention to the fact that the 36 seizures were over a long period of time and the number of seizures was comparatively insignificant. Neither do we know the subsequent result of the various seizures referred to. However, we assume that the seizures of butter mentioned consigned to petitioner are the same as those here involved. The Government cites no reported cases; and none has been called to our attention where such seizures have been challenged and any other court holds that the Federal Food, Drug & Cosmetics Act and the standards set up therein supersede in so far as the *raw material* is concerned, the *standards* as set up, recognized and established in the special act known as the Renovated Butter Act.

It is also a matter of common knowledge of which the

Court will take judicial notice that in many of the instances of seizure the amounts of packing stock butter involved were so small, a contest would not have been justified on account of the expense and loss of time.

The Court also knows that this is true of a great many Federal procedures and prosecutions. The cost and expense and time lost in litigating many rights which citizens deem to have been infringed or invaded by federal officers or agents is such that citizens submit and accept the penalty rather than go to the trouble and expense and loss of time necessary and required to vindicate their rights in the Federal Courts.

But in the present instance it is not just the butter seized. The life of the renovated butter industry is at stake, and the decision of the court below in its construction of the Federal Food, Drug & Cosmetics Act is such that it will be undoubtedly followed by the Federal Agents or the Administrator under the Federal Food, Drug & Cosmetics Act. Until the Supreme Court finally declares what the law really is, the greatest confusion and conflict of authority and of Federal Bureaus will result. And any producer or shipper of raw material, or manufacturer of Renovated Butter, would proceed in fear and trembling.

The Petitioner's fears that the renovated butter industry cannot survive in the event the Federal Food, Drug & Cosmetics Act is construed and applied as indicated by the opinion of the court below as applied to the raw material out of which process butter is manufactured are real and well founded.

The whole renovated butter business depends upon securing the raw material or packing stock butter not in its then condition to be used for human food but by scientific and constantly improving methods of treatment to be made fit by being melted, sterilized, centrifuged and strained into pasteurized butter oil which is mixed with sterilized